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Supreme Court of the United States

OCTOBER TERM, 1953.

No. 350

THE LAWRENCE-CEDARHURST BANK,

Petitioner,

vs.

MORTIMER J. DAVIS, *Trustee.*

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States

OCTOBER TERM, 1953

No. .....

THE LAWRENCE-CEDARHURST BANK,
Petitioner,

vs.

MORTIMER J. DAVIS, Trustee.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, THE LAWRENCE-CEDARHURST BANK, a New York banking corporation, for its petition herein, respectfully shows to this Honorable Court as follows:

I.

Nature of Petitioner's Application.

Pursuant to Rule 38 of this Honorable Court, your petitioner respectfully applies for a writ of certiorari to review the decision and judgment of the Court of Appeals of the United States for the Second Circuit, rendered in the above-entitled proceeding on May 20, 1953, reported 204 F. 2d 431, which affirmed the order of the United States District Court for the Eastern District of New York dated October 23, 1952, reported 107 F. Supp. 914, confirming the order of

a Referee in Bankruptcy which held invalid as against the mortgagor's trustee in bankruptcy, a chattel mortgage executed by the bankrupt on October 29, 1951, to the petitioner as mortgagee, and which held that a payment received thereunder by the petitioner was a voidable preference.

Review is sought on the ground that said Second Circuit has decided an important question of local law (i. e., the construction and scope of the New York Bulk Mortgage Act, Lien Law, Sec. 230-a) in a way in conflict with applicable local decisions (i. e., *Sternberg* v. *Rubenstein*, 305 N. Y. 235, decided April 16, 1953, and cases cited therein as declaratory of the New York law).

II.

The jurisdiction of this Court.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254.

On December 6, 1951, an involuntary petition of bankruptcy was filed against Arrow Home Appliances, Inc. in the United States District Court for the Eastern District of New York. On December 6, 1951, Kenneth E. Vought was appointed as Receiver. On December 12, 1951, the Receiver applied to the Referee in Bankruptcy for an order authorizing him to sell the chattels covered by the said chattel mortgage dated October 29, 1951, free and clear of the lien thereof, the proceeds to be held in a separate fund to await the further order of the Court as to the validity and extent of said chattel mortgage (fols. 15-21). On December 13, 1951, an order to show cause to such effect was duly made by the Referee. On December 15, 1951, the Bank filed a counter-petition and notice of motion for a

reclamation order in respect to the mortgaged chattels (fols. 22-40). On December 17, 1951, the Referee filed an answer praying for the denial of the Bank's motion and for an order adjudging that the chattel mortgage was null and void for failure to comply with Sec. 230-a of the New York Lien Law with respect to notices to creditors, and on other grounds (fols. 41-45). A stipulation was thereupon entered into between the Receiver and the Bank permitting the sale of the mortgaged articles free and clear of the lien thereon, and reserving for future determination the validity of the chattel mortgage, and an order to such effect was made on January 3, 1952. On January 3, 1952, Mortimer J. Davis was duly elected and appointed Trustee in Bankruptcy and thereafter adopted and continued the proceeding so instituted by the Receiver (fols. 2-5).

The issues so raised by the Receiver's petition dated December 12, 1951, the Bank's reclamation petition dated December 15, 1951, and the Receiver's answer dated December 17, 1951, came on for trial before the Referee in Bankruptcy on February 28, 1952 and on April 1, 1952 (fols. 5, 6).

On August 4, 1952, the Receiver's motion was granted by the Referee and an order made adjudging that the said chattel mortgage dated October 29, 1951 was null and void as against the Trustee in Bankruptcy for failure to comply with Lien Law Sec. 230-a, and further adjudging that the sum of $230 received by the Bank on November 30, 1951, representing the proceeds of sale of certain mortgaged articles, was preferential (fols. 103-110).

By petition verified August 12, 1952, the Bank petitioned for review of the said order by the United States District Court for the Eastern District of New York (fols. 112-123). On October 23, 1952, the said District Court (District Judge Galston) affirmed the order of the Referee

(fols. 130-159). On October 28, 1952, the Bank appealed to the United States Court of Appeals for the Second Circuit from the said order of the United States District Court (fols. 160-165). On May 20, 1953, the said Second Circuit affirmed the said order of the District Court. The mandate of the said Second Circuit thereon was issued on June 5, 1953. On July 17, 1953, petitioner moved to recall the mandate and for leave to petition for a rehearing. On August 6, 1953, said motion was denied. The Court's *per curiam* opinion is hereto attached.

By order dated August 17, 1953, the time for filing this petition for writ of certiorari was extended to and including September 21, 1953 (p. 211).

III.

Statement of the matters involved.

The mortgage in question (Trustee's Ex. 1) is printed in the record at pages 187-190.

The facts regarding the mortgage were not in dispute. The mortgagor (the present bankrupt) was a retail dealer in home appliances such as washing machines, dryers, refrigerators and television sets. It conducted its business at two stores, one in Cedarhurst, New York, and the other in Valley Stream, New York. The bankrupt was incorporated in January 1950, and succeeded to the business of a partnership called Arrow Home Appliances, which had been in existence prior to that date (fols. 59, 60).

On February 26, 1948, the Bank loaned the partnership the sum of $6,000, represented by a promissory note in said amount payable on demand, secured by a chattel mortgage covering articles of merchandise specifically enumerated and described, valued at approximately $7,500. Every two months thereafter, the amount of the loan was charged

against the borrower's account and a new promissory note given in the sum of $6,000 secured by a new chattel mortgage covering other specifically enumerated and described articles of merchandise, and the amount of the new loan less discount was thereupon credited to the borrower's account. When the bankrupt was incorporated and succeeded to the business and liabilities of the partnership, the same practice continued. Each chattel mortgage was promptly filed in the proper recording office (fols. 65-70, 73).

The mortgage in question dated October 29, 1951 was the twenty-second of the series. It covered thirty-four specifically enumerated and described articles, some of which were located in one store and some in the other. The mortgaged articles constituted nearly one-half in quantity and in value of the bankrupt's entire stock of merchandise then in both stores (Op. pp. 208-9).

Both the Referee and the District Court exonerated the Bank of any lack of good faith in taking the mortgage of October 29, 1951, and the Second Circuit accepted such findings. On October 29, 1951, the Bank did not know and had no reason to believe that the mortgagor was in financial difficulties (Op. p. 209).

The Referee held that the mortgage was one in bulk because it covered "a substantial part" of the bankrupt's stock of merchandise. Enumeration and description of the mortgaged articles, and the good faith of the mortgagee, were immaterial (fols. 95, 96).

The District Judge held that "there was no sale in bulk as contemplated by the statute" (fol. 145), but that the mortgage nevertheless violated Lien Law Sec. 230-a because it covered "a substantial part of the merchandise" (fols. 150, 151). He cited *Sternberg* v. *Rubenstein*, 279 A. D. 30; *Jubas* v. *Sampsell*, 185 F. 2d 333; and *Markwell & Co.* v. *Lynch*, 114 F. 2d 373.

The Second Circuit followed the Referee's view. The Court said (p. 210):

> "We believe the *Sternberg* case represents the correct interpretation of the statute and think it decisive of the case at bar. When the mortgage covers a substantial part, in quantity and value, of the mortgagor's stock of merchandise, we cannot doubt that it is a mortgage 'in bulk'. To hold otherwise would create a significant loophole in the operation of the Act."

The Second Circuit also referred to *Jubas* v. *Sampsell*, 185 F. 2d 333; *Irving Trust Co.* v. *Rosenwasser*, 5 F. Supp. 1016, and *In re Weinstein*, 40 F. Supp. 798.

On April 16, 1953, unknown to Court and counsel, the Court of Appeals of the State of New York (305 N. Y. 235) reversed the Appellate Division decision in *Sternberg* v. *Rubenstein*, 279 A. D. 30.

Rejecting the basic theory of the Appellate Division that when a mortgage covers a substantial part in quantity and value of the mortgagor's stock of merchandise, it falls within the statute, the New York Court of Appeals, "limited the reach of this statutory provision to cases involving the sale of substantially the entire inventory or business."

The New York Court of Appeals said:

> "Recognizing the onerous nature of the restrictions imposed upon transactions within its scope, this court early construed the Bulk Sales Act as being meant to apply only in 'rare and irregular cases', only to the 'extraordinary sale * * * such as can occur but few times in the life of a merchant'. (*Wright* v. *Hart, supra*, 182 N. Y. 330, 356, 357, per Vann, J., dissenting—whose dissent was later adopted unanimously in *Klein* v. *Maravelas, supra*, 219 N. Y. 383,

387). Following this guide, our courts have limited the reach of this statutory provision to cases involving the sale of substantially an entire inventory or business. (See, e.g., *Mott* v. *Reeves, supra,* 125 Misc. 511, affd. 217 App. Div. 718, affd. 246 N. Y. 567; *Bimberg & Co.* v. *Unity Coat & Apron Co.,* 150 Misc. 836, affd. 244 App. Div. 777; *Texas Co.* v. *Drexelius,* 176 Misc. 371; see, also, *New York Credit Men's Assn.* v. *Domestic Broadtail Producers,* 61 F. Supp. 102, 105.)"

Referring to the same cases relied upon by the federal courts herein, the New York Court of Appeals said:

> "Of the three cases relied upon by the trustee to support his position (*Jubas* v. *Sampsell,* 185 F. 2d, 333; *Irving Trust Co.* v. *Rosenwasser, supra,* 5 F. Supp., 1016; *Conquest* v. *Atkins, supra,* 123 Me., 327; see also *Markwell & Co.* v. *Lynch,* 114 F. 2d 373), two are distinguishable on their facts and the third (*Jubas* v. *Sampsell, supra,* 185 F. 2d 333) arose under a California statute which, unlike our statute, adopts the explicit criterion whether the sale was made 'in the regular and usual practice and method of business of the vendor' (Cal. Civ. Code (Deering Supp. 1951), section 3440.1, formerly section 3440). But, distinguishable or not, reason and a regard for the practices prevalent in the retail shoe business—as reflected by the record before us—prompt rejection of the arbitrary and inflexible rule that would invalidate this sale."

Only the dissenting opinion of Judge Desmond favored the view embraced by the Second Circuit herein. He said:

> "The plain meaning of the statute is that when a storekeper disposes of a substantial part of his stock in trade in bulk, and selling in bulk sales is not

the usual and ordinary way in which he conducts his business from day to day, the sale falls within the statute (*Jubas* v. *Sampsell*, 185 F. 2d 333, 334)."

On July 17, 1953, upon learning of the reversal in the *Sternberg* case, the petitioner applied to the Second Circuit for recall of its mandate and for leave to petition for rehearing. On August 6, 1953, the Second Circuit denied the motion. (See Appendix to this petition, p. 12.)

The Second Circuit said:

> "If we thought that reversal of the Appellate Division's decision in the *Sternberg* case proved that we had misinterpreted the New York law, we should not hesitate to grant the motion despite its untimely presentation. We relied on the *Sternberg* decision for its rejection of the view that 'bulk' (as used in the Bulk Sales and Bulk Mortgage Acts) refers only to merchandise that is not separated from the mass, nor counted, weighed or measured. The Court of Appeals' reversal makes no mention of this portion of the lower court's opinion; the reversal was on another ground from that on which we relied."

The Second Circuit continued:

> "In the *Sternberg* case the record showed that in the retail shoe business the sale of 'off-season' wares was customary and, as the Court of Appeals put it, an 'established operating pattern.' Hence the sale under attack was held to be 'in the ordinary course of trade and in the regular prosecution of said business.' No comparable customary practice was proved to exist with respect to mortgaging the goods involved in the case at bar, * * *."

IV.

The questions presented.

(1) Whether the New York Bulk Sales and Bulk Mortgage Acts, as interpreted by applicable New York decisions, extend to a sale or mortgage of "a substantial part, in quantity and value, of a stock of merchandise" (*Jubas* v. *Sampsell, supra; Irving Trust Co.* v. *Rosenwasser, supra, In re Weinstein, supra, Davis* v. *Lawrence-Cedarhurst Bank,* herein), or whether they are limited to "cases involving the sale or mortgage of substantially an entire inventory or business" (*Sternberg* v. *Rubenstein,* 305 N. Y. 235, 239).

(2) Whether the chattel mortgage dated October 29, 1951 was a "mortgage or conveyance intended to operate as a mortgage upon a stock of merchandise in bulk or any part thereof," within the meaning of Section 230-a of the Lien Law of the State of New York.

V.

Grounds for granting the within petition.

(1) The said decision and judgment of the United States Court of Appeals for the Second Circuit, is in conflict with the law of the State of New York as established by the New York Court of Appeals in *Sternberg* v. *Rubenstein,* 305 N. Y. 235.

(2) The Appellate Division decision in *Sternberg* v. *Rubenstein* upon which the United States Court of Appeals relied does not represent the correct interpretation of Personal Property Law, Sec. 44, and Lien Law, Sec. 230-a. *Irving Trust Co.* v. *Rosenwasser,* 5 Fed. Supp. 1016, cited

by the Second Circuit was distinguishable on its facts, and *Jubas* v. *Sampsell,* 185 F. 2d 333, arose under a California statute which adopted a criterion different from that of New York Lien Law, Sec. 230-a. None of these decisions represent the New York law.

VI.

Petitioner begs leave to amplify its arguments and reasons for granting the writ, in the brief which is herewith submitted.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court directed to the United States Court of Appeals for the Second Circuit, sitting at New York, N. Y., commanding that Court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and of all proceedings had by the United States Court of Appeals in said cause, to the end that this cause may be reviewed and determined by this Honorable Court; that the said decision and judgment of the United States Court of Appeals be reviewed by this Honorable Court, and that your petitioner be granted such further relief as may seem proper.

And your petitioner will ever pray.

THE LAWRENCE-CEDARHURST BANK,

By: CLAYTON L. SEAMAN,
President.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF NEW YORK, } ss.:

CLAYTON L. SEAMAN, being duly sworn, deposes and says:

That he is President of the petitioner herein; that he has read the foregoing petition subscribed by him, and that the facts stated therein are true to the best of his knowledge, information and belief.

CLAYTON L. SEAMAN.

Sworn to before me this 11th day of September, 1953.

JOHN J. NUDORF
NOTARY PUBLIC STATE OF NEW YORK
No. 30-[illegible]
Notary Public, [illegible] County
Term expires March 30, 1954

I HEREBY CERTIFY that I have examined the foregoing petition; that in my opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

Dated: September 11th 1953.

EDWARD S. BENTLEY,
Counsel.

Appendix.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

OCTOBER TERM, 1952.

(Motion submitted July 17, 1953. Decided August 6, 1953.)

DOCKET NO. 22610.

MORTIMER J. DAVIS, Trustee,
Appellee,

v.

THE LAWRENCE-CEDARHURST BANK,
Appellant.

Before:

CHASE, Chief Judge, SWAN and CLARK, Circuit Judges.

On Motion of Appellant for Recall of Mandate and for Leave to Petition for Rehearing. Motion denied.

CONKLIN & BENTLEY, Attorneys for Appellant;
EDWARD S. BENTLEY, of Counsel.

MAX SCHWARTZ, Attorney for Appellee;
WILLIAM J. RUDIN, of Counsel.

PER CURIAM:

In an opinion adverse to the appellant, filed May 20, 1953, 204 F. 2d 431, we referred to *Sternberg* v. *Rubenstein*, 279 App. Div. 30, and said: "We believe the Sternberg case represents the correct interpretation of the statute and think it decisive of the case at bar." Unknown to counsel or the court, the decision of the Appellate Division had been reversed shortly before our opinion was rendered. *Sternberg* v. *Rubenstein*, 305 N. Y. 235. Before

counsel for the appellant became aware of such reversal the time within which our Rules permit a petition for rehearing to be filed had already passed and our mandate had gone down. He thereupon made the present motion for recall of mandate and for leave to petition for a rehearing and reargument.

If we thought that reversal of the Appellate Division's decision in the *Sternberg* case proved that we had misinterpreted the New York law, we should not hesitate to grant the motion despite its untimely presentation. We relied on the *Sternberg* decision for its rejection of the view that "bulk" (as used in the Bulk Sales and Bulk Mortgage Acts) refers only to merchandise that is not separated from the mass, nor counted, weighed or measured. The Court of Appeals' reversal makes no mention of this portion of the lower court's opinion; the reversal was on another ground from that on which we relied. In the *Sternberg* case the record showed that in the retail shoe business the sale of "off-season" wares was customary and, as the Court of Appeals put it, an "established operating pattern". Hence the sale under attack was held to be "in the ordinary course of trade and in the regular prosecution of said business." No comparable customary practice was proved to exist with respect to mortgaging the goods involved in the case at bar, nor were they shown to be "off-season" or outmoded merchandise. On the contrary, they were selected in order to give a value of about $7,500 as collateral for the $6,000 loan, and were evidently currently salable at retail. Indeed, some of the mortgaged items were sold while the mortgage was outstanding. On their facts the two cases are obviously distinguishable.

As alternative relief the movant asks that our mandate be recalled and stayed pending application for a writ of certiorari. A recall and stay is not needed to enable the appellant to apply for a writ. What it needs is a stay of collection by the trustee in bankruptcy until the Supreme Court can pass on the petition for a writ. An application for such a stay can be made to the bankruptcy judge and before he has had an opportunity to pass upon it, there is no reason for us to intervene. Motion denied.

Supreme Court of the United States

October Term, 1953

No. .....

The Lawrence-Cedarhurst Bank,
Petitioner,

vs.

Mortimer J. Davis, Trustee.

PETITIONER'S BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI.

I.

The applicable statutes.

New York Lien Law, Sec. 230-a. "Chattel mortgages on stocks of merchandise. Every mortgage or conveyance intended to operate as a mortgage upon a stock of merchandise in bulk or any part thereof, or upon merchandise and fixtures pertaining to the conduct of the business of the mortgagor, shall be void as against the creditors of the mortgagor, unless * * *," certain formalities are complied with.

New York Personal Property Law, Sec. 44. "Transfer of goods and/or fixtures in bulk.

1. The sale, transfer or assignment in bulk of any part or the whole of a stock of merchandise or of fixtures, or

merchandise and of fixtures pertaining to the conducting of the business of the seller, transferrer or assignor, otherwise than in the ordinary course of trade and in the regular prosecution of said business, shall be void as against the creditors of the seller, transferrer or assignor unless * * *," certain formalities are complied with.

II.

The decision of the United States Court of Appeals for the Second Circuit was contrary to the interpretation of the New York Bulk Sales and Mortgage Acts announced by the New York Court of Appeals in *Sternberg* v. *Rubenstein*, 305 N. Y. 235.

The New York Bulk Mortgage Act (Lien Law, Sec. 230-a), enacted in 1921 and amended in 1922, was an application to mortgages of the Bulk Sales Act (Personal Property Law, Sec. 44), originally adopted in 1902 and last amended in 1945. As the Courts have repeatedly said, even in the case at bar, cases construing one statute are apposite to the other. *In re Saraw*, 91 F. 2d 957; *In re Henningsen*, 297 F. 821; *Matter of Arrow Home Appliances, Inc.*, 204 F. 2d 431. See also *Atamian* v. *O'Leary*, 154 Misc. 757.

Although neither L. L. Sec. 230-a nor P. P. L. Sec. 44 defined the phrase "mortgage upon a stock of merchandise in bulk or any part thereof", or "sale, transfer, or assignment in bulk of any part of the whole of a stock of merchandise", the purpose of those enactments and the objects intended to be accomplished have been repeatedly and uniformly stated thus:

> "The evil at which the section was aimed was the perpetration of a fraud on creditors by putting a bulk mortgage on a stock of goods or part of it and

making off with the proceeds." (*In re Rosom Utilities, Inc.*, 105 F. 2d 132).

"* * * it was aimed at a class of merchants who have engaged in the fraudulent practice of obtaining merchandise on credit for the purpose of making hasty and secret sales thereof in bulk and then decamping with, or otherwise disposing of, the proceeds at the expense of their creditors." (*Wright* v. *Hart*, 182 N. Y. 330, 336, Werner, J.).

At the time the appeal was argued in the Second Circuit on April 9, 1953, two divergent lines of legal theory existed as to the scope to be given to these statutes.

(1) Originally held unconstitutional in 1905 in *Wright* v. *Hart*, 182 N. Y. 330, where the statute was termed "drastic and cumbersome" and "in restraint of the rights of liberty and property as those terms have been judicially declared", and later sustained, partly at least because of the universality then attained by such legislation (*Klein* v. *Maravelas*, 219 N. Y. 383), the New York courts have, with few exceptions, given these statutes a strict construction and limited scope. See *Mott* v. *Reeves*, 125 Misc. 511, *aff'd* 217 App. Div. 718, *aff'd* 246 N. Y. 567; *Thorndike & Hix Lobster Co.* v. *Hall*, 132 Misc. 723; *Citizens Trust Co.* v. *Merselis*, 148 Misc. 676, *aff'd* 244 App. Div. 845, *aff'd* 271 N. Y. 539; *Apex Leasing Co., Inc.* v. *Litke*, 173 App. Div. 323, *aff'd* 225 N. Y. 625; *Adams-Flanigan Co.* v. *Di Donato*, 180 App. Div. 342, *aff'd* 228 N. Y. 542; *Hersch* v. *Schwartz*, 47 N. Y. Supp. 2d 63, *aff'd* 268 App. Div. 1027. Also compare *Atamian* v. *O'Leary, supra*, and authorities cited therein, which held that a "sale, transfer or assignment" as used in New York P.P.2., Sec. 44 did not include a mortgage, with the contrary holding of *In re Convisser*, 5 F. 2d 177 and cases cited, which held that "sale, transfer

or assignment" as used in the California statute was broad enough to cover a pledge.

Consonant with these principles, even the federal courts have refused to apply the statute to mortgages which might have been thought to fall within the literal wording of its provisions. See *In re Rosom Utilities, Inc., supra,* where it was held that a purchase money mortgage "was not within the intendment of the statute, even though there is no express exception of purchase money mortgages".

More recently, in *Matter of Stein* v. *Doran,* 266 A. D. 788, a series of mortgages executed simultaneously by a dealer in second-hand automobiles, were held to be valid, notwithstanding that such mortgages constituted in the aggregate a mortgage upon a substantial part of the dealer's stock of merchandise. As District Judge Conger remarked in *New York Credit Men's Association, Inc.* v. *Domestic Broadtail Producers, Inc.,* 61 F. Supp. 102, a case cited in *Sternberg* v. *Rubenstein,* 305 N. Y. 235, 239, as representative of the holdings of the courts in the State of New York,

> "In all the cases that have come to my attention, the entire stock, or substantially the entire stock of the merchant was transferred."

The rule of law followed in the New York courts was stated with finality by Judge Fuld on April 16, 1953 in *Sternberg* v. *Rubenstein, supra,* at p. 239, thus:

> "Recognizing the onerous nature of the restrictions imposed upon transactions within its scope, this court early construed the Bulk Sales Act as being meant to apply only in 'rare and irregular cases', only to the 'extraordinary sale * * * such as can occur but few times in the life of a merchant' (*Wright* v. *Hart, supra,* 182 N. Y. 330, 356, 357, per Vann, J.,

dissenting—whose dissent was later adopted unanimously in *Klein* v. *Maravelas, supra,* 219 N. Y. 383, 387)."

The Court continued:

> "Following this guide, our courts have limited the reach of this statutory provision to cases involving the sale of substantially an entire inventory or business."

Cases were cited, among them *New York Credit Men's Association, Inc.* v. *Domestic Broadtail Producers, Inc., supra.*

(2) The contrary view adopted by the Second Circuit in the case at bar, did not limit the "reach" of these statutes to a transfer of "substantially an entire inventory or business", but held that they condemned a sale or mortgage covering "a substantial part" of a stock of merchandise other than in the regular course of business.

This view had its origin and support in *Jubas* v. *Sampsell,* 185 F. 2d 333, which in turn rested on *Markwell & Co.* v. *Lynch,* 114 F. 2d 373, both California cases.

Jubas v. *Sampsell* involved a sale by a retail shoe store of a single lot of "1240 pairs of shoes which were of broken sizes and out of style," and which "constituted 25% in quantity and 15% in value of the whole stock." The California statute covered,

> "* * * the sale, transfer or assignment of a stock in trade, in bulk, or a substantial part thereof otherwise than in the ordinary course of trade and in the regular and usual practice and method of business of the vendor * * *."

The Eighth Circuit said:

> "The plain meaning of the statute is that when a storekeeper disposes of a substantial part of his stock in trade in bulk, and selling in bulk sales is not the usual and ordinary way in which he conducts his business from day to day, the sale falls within the statute."

The New York Appellate Division in *Sternberg* v. *Rubenstein*, 279 App. Div. 30 squarely adopted the rule of *Jubas* v. *Sampsell* saying:

> "We think the sale of 1294 pairs of shoes which represented at least one-sixth of his stock on hand, in money value, constituted a sale 'in bulk,' 'otherwise than in the ordinary course of trade and in the regular prosecution of said business' within the language and intent of section 44 of the Personal Property Law. * * * In the absence of direct authority in our appellate courts to the contrary, the decisions in *Jubas* v. *Sampsell* (185 F. 2d 333, 334), and *Irving Trust Co.* v. *Rosenwasser* (5 F. Supp. 1016), are very persuasive in view of the fact that the sale in both of those cases was very similar to the sale here under consideration."

On April 9, 1953, when the case at bar was briefed and argued before the Second Circuit, the New York Court of Appeals in *Sternberg* v. *Rubenstein* had not yet spoken. The "direct authority in our appellate courts to the contrary" had not yet appeared.

Unaware of the decision that the New York Court of Appeals had rendered on April 16, 1953, the Second Circuit adopted the rule of *Jubas* v. *Sampsell* as thus approved by the New York Appellate Division. Briefly summarized, the Second Circuit held: (1) That "when the mortgage covers a substantial part, in quantity and value, of the mortgagor's stock of merchandise," (which was the case

of the mortgage in question), "it is a mortgage in bulk"; (2) that enumeration and specification (which were present in the mortgage here) did not "avoid the impact of the Bulk Mortgage Act or the Bulk Sales Act"; and (3) that a bulk mortgage (which the Court held this mortgage to be) is void "regardless of the good faith of the parties, unless the required notices have been given to the creditors."

In its opinion rendered on May 20, 1953, referring to the Appellate Division decision, the Second Circuit said:

> "We believe the *Sternberg* case represents the correct interpretation of the statute and think it decisive of the case at bar. When the mortgage covers a substantial part, in quantity and value, of the mortgagor's stock of merchandise, we cannot doubt that it is a mortgage 'in bulk'. To hold otherwise would create a significant loophole in the operation of the Act."

The refusal of the Second Circuit to recall its mandate and grant a rehearing following the reversal of the Appellate Division in the *Sternberg* case, and particularly the reason which it gave for so refusing, shows that the Second Circuit believed that its foregoing conclusions still represented a correct statement of the law of New York. For, if it had thought that the New York Court of Appeals' decision was contrary to any of its said holdings, the Second Circuit would, as it said, "not hesitate to grant the motion".

The reversal, as the Second Circuit saw it, was due to the Court of Appeals' holding that the sale of "off-season" wares was customary and an "established operating pattern", a finding of fact which brought the case within the exception or qualifying clause of the statute. The Second

Circuit added—in the face of the conceded fact that in the case of *Arrow Home Appliances,* this practice had continued over a period of three years, and the mortgage in question was the twenty-second of the series—that "no comparable customary practice was proved to exist with respect to the mortgaging the goods involved in the case at bar."

In other words, the Second Circuit still regarded the "substantial part" rule of *Jubas* vs. *Sampsell* to be in force in the State of New York, subject to the single exception (which the Court of Appeals found to be present in *Sternberg* vs. *Rubenstein,* and which the Second Circuit held to be absent in the case at bar), where the sale or mortgage was made in the ordinary course of trade and in the regular and usual practice and method of business of the vendor or mortgagor.

No other possible explanation exists for the Second Circuit's adherence to its original decision. On no other theory could *Sternberg* in the Appellate Division represent the correct interpretation of the New York statute and be decisive here, but *Sternberg* in the Court of Appeals have no controlling weight.

Granting that Judge Fuld's opinion gave no support to our argument that enumeration, specification and itemization, without more, permitted the mortgage to escape the statute, it was only under the "substantial part" rule such as *Jubas* vs. *Sampsell* and Judge Desmond's dissent in *Sternberg* vs. *Rubenstein,* that the petitioner's mortgage could be brought within the application of the statute.

We respectfully submit that the Second Circuit completely misapprehended the character of the Court of Appeals' decision in the *Sternberg* case.

No one can read the casual and superficial briefs of counsel before the New York Court of Appeals in *Stern-*

berg v. *Rubenstein* and compare them with Judge Fuld's exhaustive analysis of the history and purpose of bulk transfer legislation and his categorical rejection of *Jubas* v. *Sampsell* as inapplicable to New York law—whether or not distinguishable on the facts—and fail to see that the New York Court of Appeals was determined to give a definitive restatement of its attitude on these statutes.

The point made by the Second Circuit, that the vehicle for such pronouncement was merely the finding that the sale of off-season merchandise was a recurring event in the ordinary course of business there involved, cannot obscure the fact that the Court of Appeals went out of its way to broadcast the construction which it demanded should be given to these statutes in New York. Nothing is more apparent on reading this opinion, than that the New York Court of Appeals has turned away from this legislation, which, as the Court noted, was "adopted largely through the efforts of the National Association of Credit Men in every state in the nation."

The Court's reference to Billig, Bulk Sales Laws: A Study in Economic Adjustment (77 U. of Pa. L. Rev. 72, 81-99), who commented that "behind these various state enactments lies the story of one of the most highly organized and thoroughly efficient nationwide lobbying campaigns ever conducted in the interests of one economic group," and who quoted Dean Pound's statement that this legislation was the result of "organized pressure from groups having a common economic interest" (Interpretation of Legal History, 1923 Ed, p. 113), indicates the conflict in legal philosophy between the law established by the New York courts and the theory of the Second Circuit here, and gives the reason for the sweeping limitation placed upon this legislation by the Court of Appeals decision in *Sternberg* v. *Rubenstein*.

The distinction between "substantially all" and "a substantial part" is no mere play on words.

Mathematically, a "substantial part" was held to be as low as one-fifteenth or 7% (*Markwell & Co.* vs. *Lynch, supra*). Conversely "substantially all" might have to be as high as ninety per cent (*Sprintz* v. *Saxton,* 126 App. Div. 421). Fundamentally, the distinction is even more important.

The purpose of the Bulk Mortgage Act or the Bulk Sales Act, so clearly described by the men who drafted them and by the courts that enforced them (See 305 N. Y. 235), will be fully satisfied by limiting their operation to the transfer of substantially all of a stock of merchandise or business. Only a merchant who transfers substantially all of his stock can possibly fall within the group at whom the bulk transfer statutes were aimed, for only such a merchant can be one who "sells out his stock in trade to a friend for less than it is worth, pays his creditors less than he owes them, and hopes to come back into business through the back door", or "sells out his stock in trade to anyone for any price, pockets the proceeds and disappears leaving his creditors unpaid." A merchant who transfers merely part of his merchandise, even if it is a substantial part of his merchandise, is much more likely to continue in business and stay in the community. The "substantial part" rule is contrary to the very objective of the statutes.

Specifically criticizing the expansion of the New York statutes by decisions such as *Jubas* v. *Sampsell,* the New York Court of Appeals laid down the confines of those statutes in no uncertain language.

The bulk transfer statutes in New York were not the all-purpose weapons that the Appellate Division and the Second Circuit would make of them. There was no "loop-hole in the operation of the Act" which required filling by

judicial legislation, because they were never intended as comprehensive pieces of legislation.

The Bankruptcy Act, the New York Debtor and Creditor Law, and other similar statutes were available and might be resorted to where the facts warranted. The Bulk Sales Act and the Bulk Mortgage Act, in "rare and irregular cases", would avoid, automatically and with mechanical severity, transfers of substantially an entire stock of merchandise regardless of good faith and adequacy of consideration, unless made in the ordinary course of business. But these bulk transfer statutes should no longer be applied in New York, as the Second Circuit has expanded them, to transfers made in good faith for full consideration, whose only fault was that they covered a substantial part of a stock of merchandise.

The Second Circuit should not have passed off so lightly the sweeping nature of this decision.

The question of which view is entitled to prevail, is an important one, the more so since New York is the busiest state in the Union, and frequently sets the pattern elsewhere.

For the bankruptcy courts and their trustees and receivers and their attorneys, the decision of the Second Circuit is one of the most important rulings of recent times, for, if sustained, it will create and sanction the use of a new, automatic and ruthless weapon, by which the estate of the general creditors will profit through setting aside as void innumerable transfers made in good faith and for full consideration, as much as ten years previously (N. Y. Civil Practice Act, Sec. 53; *Treadwell* v. *Clark,* 190 N. Y. 51; *Buttles* v. *Smith,* 281 N. Y. 226, 236) although they may have been utterly beyond the purview and time limitations of the Bankruptcy Act and the state insolvency statutes.

For the merchant seeking credit and for the lending institution, it will, if sustained, put an end to chattel mortgage financing as it has been carried on for centuries, and, except in special cases, will limit secured borrowing (as the Second Circuit frankly admitted), to "purchase money mortgages, conditional sales and trust receipts", a form of security which can only be used to finance the purchase of merchandise, and which is completely unavailable when the merchant needs financing for other purposes.

III.

For these reasons, it is submitted that the Circuit Court of Appeals for the Second Circuit has decided herein an important question of local law in a way squarely in conflict with applicable local decisions, and that this Court should, as a matter of sound judicial discretion, grant the writ of certiorari applied for.

Respectfully submitted,

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OCT 5 1953
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 350

THE LAWRENCE-CEDARHURST BANK,
Petitioner,

—*vs.*—

MORTIMER J. DAVIS, Trustee,
Respondent.

BRIEF OF TRUSTEE IN BANKRUPTCY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The petitioner seeks to review the unanimous decision of the United States Court of Appeals for the Second Circuit, 204 F. 2d 431, affirming the order of the United States District Court for the Eastern District of New York, which affirmed the order of the Referee dated August 4, 1952, adjudging the chattel mortgage, executed by Arrow Home Appliances, Inc., the bankrupt, to The Lawrence-Cedarhurst Bank, on October 29, 1951, in the sum of $6,000.00 to be null and void as against the Trustee in Bankruptcy, and that the payment received thereunder of $230.00 to be preferential.

The statement of facts by petitioner is substantially correct.

The bankrupt was engaged in the business of selling at retail washing machines, dryers, refrigerators and television sets.

On October 29, 1951, the bankrupt executed the mortgage in question to The Lawrence-Cedarhurst Bank, covering a large quantity of merchandise that had been received from the creditors by the bankrupt as late as October 18, 1951, and which merchandise had been purchased by the bankrupt

on open credit from the creditors. The chattel mortgage enumerated on its face the merchandise covered by the mortgage, which included the washers, dryers, gas ranges, ironers and television sets. The merchandise covered by the mortgage had a conceded cost value of $7,500.00 and was intended to secure an indebtedness of $6,000.00. The merchandise covered by the mortgage constituted nearly one-half in quantity and in value of the bankrupt's merchandise.

The Referee held that the mortgage came within Section 230a of the Lien Law of the State of New York in that it covered a substantial part of the bankrupt's stock of merchandise and, therefore, was null and void as against the Trustee in bankruptcy for failure on the part of the Bank to comply with the provisions of Section 230a of the Lien Law of the State of New York inasmuch as it was conceded that there had been no compliance with the section on the part of the Bank (Op. pp. 32-33).

The District Judge held that the chattel mortgage came within Section 230a of the Lien Law of the State of New York in that it covered a substantial part of the merchandise of the bankrupt and by reason of the failure of the Bank to comply with the requirements of Section 230a of the Lien Law of the State of New York, the mortgage was null and void as against the Trustee in bankruptcy (Op. pp. 50-51).

The Court of Appeals held that the mortgage, covering more than one-half in quantity and in value of the bankrupt's entire stock of merchandise, was a mortgage in bulk and within the provisions of Section 230a of the Lien Law of the State of New York; that by reason of the failure of the Bank to comply with the section, the chattel mortgage was null and void, and that the invalidation of the mortgage compelled affirmance of the order holding the $230.00 payment a voidable preference.

Thereafter, a motion was made for the recall of the mandate and for leave to petition for a rehearing and reargument, which motion was denied on August 6, 1953, in an opinion adhering to the opinion in 204 F. 2d 431. The opinion deny-

ing the rehearing, dated August 6, 1953, is as yet not reported.

The question presented to and determined by the Referee in Bankruptcy, the District Court and the Court of Appeals was "is the chattel mortgage null and void as against the trustee in bankruptcy for failure to comply with Section 230a of the Lien Law of the State of New York as a mortgage in bulk covering a substantial part in quantity and in value of the mortgagor's stock of merchandise and for failure to comply with the Statute where it was conceded that there had been no compliance with the provisions of the Statute."

POINT I.

THE CHATTEL MORTGAGE IS NULL AND VOID AS AGAINST THE TRUSTEE.

The Referee, the District Court and the Court of Appeals have all held that the chattel mortgage came within Section 230a of the Lien Law of the State of New York and by reason of non-compliance with the provisions of the Statute, the chattel mortgage was null and void as against the Trustee in bankruptcy.

It is submitted that the Court of Appeals properly and correctly held that the chattel mortgage was null and void as against the Trustee in bankruptcy. The decision is in accord with the decisions in *Jubas* v. *Sampsell,* 185 F. 2d 333; *Irving Trust Co.* v. *Rosenwasser,* 5 F. Supp. 1016, and *In re Weinstein,* 40 F. Supp. 798; *Maxwell & Co.* v. *Lynch,* (C. A. 9) 114 F. 2d 273, and *Schainman* v. *Dean,* (C. A. 9) 24 F. 2d 475.

Subsequent to the decision in 204 F. 2d 431, a motion was made by the petitioner for the recall of the mandate and for leave to petition for rehearing and reargument, based upon the reversal of *Sternberg* v. *Rubenstein,* 279 App. Div. 30, by the Court of Appeals of the State of New York. The U. S. Court of Appeals for the Second Circuit said:

> "If we thought that reversal of the Appellate Division decision in the Sternberg case proved that we mis-

> interpreted the New York Law, we should not hesitate to grant the motion despite its untimely presentation. We relied on the Sternberg decision for its rejection of the view that 'bulk' (as used in the Bulk Sales and Bulk Mortgage Acts) refers only to merchandise that is not separated from the mass, nor counted, weighed or measured. The Court of Appeals' reversal makes no mention of this portion of the lower court's opinion; the reversal was on another ground from that on which we relied."

There is no conflict in interpretation of the Statute. There is no conflict in the decision. The decision of the Court of Appeals is in accord with the decisions of other Circuits upon this subject. The intent of the Statute was to require notice if the mortgage covered a substantial part in quantity and in value of the mortgagor's stock of merchandise. To hold otherwise would create a significant loophole in the operation of the Statute and enable any mortgagor or mortgagee to defeat its purpose.

CONCLUSION.

There being no conflict in decisions and there being no important decision of law involved and as the decision of the U. S. Court of Appeals properly and correctly held the chattel mortgage to be null and void, the petition for certiorari should be denied.

Respectfully submitted,

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